(4)

98-563

No. ~~98-367~~

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

NORMAN GABAY,
Petitioner,

v.

MOSTAZAFAN FOUNDATION OF IRAN,
a/k/a The Foundation for the Oppressed,
an agency or instrumentality of the Islamic Republic of Iran,
and
MOSTAZAFAN FOUNDATION OF NEW YORK,
n/k/a The Alavi Foundation,
an alter ego of the Mostazafan Foundation of Iran,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Second Circuit

REPLY BRIEF OF PETITIONER

Of Counsel:
Professor Nelson Lund
3401 N. Fairfax Drive
Arlington, VA 22039
(703) 993-8045

Steven R. Perles*
STEVEN R. PERLES, P.C.
1666 Connecticut Ave., NW
Suite 500
Washington, DC 20009
(202) 745-1300

*Counsel of Record

10 November 1998

6 pp

No. 98-567

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

NORMAN GABAY,

Petitioner,

v.

MOSTAZAFAN FOUNDATION OF IRAN,
a/k/a The Foundation for the Oppressed,
an agency or instrumentality of the Islamic Republic of Iran,
and
MOSTAZAFAN FOUNDATION OF NEW YORK,
n/k/a The Alavi Foundation,
an alter ego of the Mostazafan Foundation of Iran,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Second Circuit

REPLY BRIEF OF PETITIONER

Understandably, perhaps, Respondents have repeatedly and profoundly mischaracterized this Court's decision in *First National City Bank* v. *Banco Para El Comercio Exterior de Cuba,* 462 U.S. 611 (1983) ["*Bancec*"], and repeatedly sought to distract the Court with factual issues that are not presented by the petition for certiorari (and which would be addressed, if at all, only on remand from this Court). Oddly, Respondent Mostazafan Foundation of Iran

has even offered a gross and bizarre misstatement of the argument in the petition for certiorari. *Cf.* Pet., pp. 20-22 *with* Brief in Opp. of Mostazafan Foundation of Iran, p. 11 (citing Pet., pp. 20-22).

What Respondents have not done is to answer our central legal argument: that the courts below inadvertently created a safe harbor for international outlaws by ignoring the important distinction that Congress drew between cases brought under the "expropriation exception" and those brought under the "commercial activities exception" of the Foreign Sovereign Immunities Act ["FSIA"]. Attempting to make light of this argument, Respondent Mostazafan Foundation of Iran calls it "consummate hyperbole." Brief in Opp. of Mostazafan Foundation of Iran, p. 11. Such language is obviously not an argument, or a useful substitute for an argument. Nor is such language accurate.

The Mostazafan Foundation is an agency or instrumentality of the Islamic Republic of Iran, which is indeed an outlaw state whose own conduct has made it a pariah among the community of nations. The Islamic Republic of Iran has expropriated U.S. business assets in violation of the laws of nations, *see, e.g., Dames & Moore* v. *Regan*, 453 U.S. 654 (1981); has overrun U.S. diplomatic property and made hostages of U.S. diplomatic personnel, *id.*; has caused the murder of United States citizens by terrorist cells under its sponsorship, *see Flatow* v. *The Islamic Republic of Iran*, 999 F. Supp. 1 (D.D.C. 1998); and has caused the hostage taking of civilian United States nationals by terrorist cells under its sponsorship, *see Cicippio, et al.* v. *The Islamic Republic of Iran*, ___ F. Supp.2d ___, 1998 WL 547021 (CA No. 96-1805, D.D.C. 27 August 1998).

The "day-to-day control" test employed below was developed for controversies arising out of the FSIA's "commercial activities exception." This test, highly respectful of the corporate form, was intended to establish a

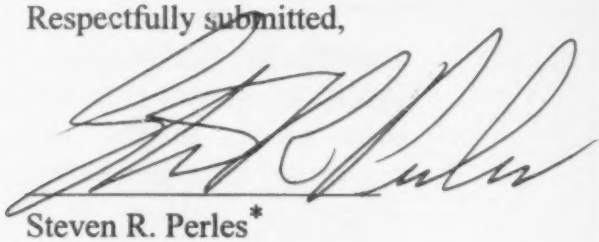
fair allocation of responsibilities among entities whose separate juridical status was presumptively the result of legitimate commercial and governmental purposes. Unlike such cases, actions arising under the "expropriation exception" are aimed at foreign government agencies that are accused of violating international law. The present case, which involves a state that is notorious for its repeated and uninhibited disregard for the law of nations, is exactly the kind of case that demonstrates the importance of respecting the distinction Congress drew between the "expropriation exception" and the "commercial activities exception."

When enacting the "expropriation exception" -- a separate exception to immunity predicated upon foreign state conduct in violation of the laws of nations -- Congress did not intend that courts employ a jurisdictional standard that would facilitate abuses of the corporate form. To do so "would permit governments to avoid international law simply by creating juridical entities whenever the need arises." *Bancec,* 462 U.S. at 633.

Ignoring the clear and emphatic guidance offered by this Court in *Bancec*, the courts below misinterpreted the statute that Congress wrote, creating a safe harbor for international outlaws. In so doing, the courts below have enabled outlaw foreign states that have indisputably expropriated the assets of United States nationals to use the courts of the United States as a shield to "avoid[] the obligations of international law." *Bancec,* 462 U.S. at 634. This is not "consummate hyperbole." On the contrary, this is exactly what is before the Court in this case, as it was in *Bancec* itself.

WHEREFORE, Petitioner respectfully requests that this Honorable Court grant his petition for certiorari.

Respectfully submitted,



Steven R. Perles*
STEVEN R. PERLES, P.C.
1666 Connecticut Ave., NW
Suite 500
Washington, DC 20009
(202) 745-1300

*Counsel of Record

Of Counsel:
Professor Nelson Lund
3401 N. Fairfax Drive
Arlington, VA 22039
(703) 993-8045

10 November 1998